FILE COPY

Office Supreme Court, U. S.
FILED
NOV 15 1929
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1929.

No. 254.

NEW JERSEY BELL TELEPHONE COMPANY,
Appellant,

vs.

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
Appellee.

On Appeal From the Court of Errors and Appeals of New Jersey.

BRIEF FOR APPELLANT

CHARLES M. BRACELEN,
FRANKLAND BRIGGS,
THOMAS G. HAIGHT,
ALFRED E. HOLCOMB,
LEONARD A. SWENEY,
Counsel for Appellant.

Table of Contents.

PAGE

Opinions of Courts Below and Grounds of Jurisdiction 1

Statement of the Case 2

Specification of Assigned Errors Relied Upon 5

Summary of Argument 5

Argument 6

Point I. 6

The tax in question is not a substituted or commuted property tax imposed in lieu of other property taxes, but is a license tax, at a fixed rate of 5%, levied directly on appellant's gross receipts derived from interstate as well as intrastate business, and is *in addition to* the ordinary *ad valorem* taxes on appellant's real and personal property.

Point II. 18

The tax in question being of the kind and having the characteristics set forth in the next preceding point is a direct tax on gross receipts derived from interstate commerce, and is, therefore, to that extent, an invalid regulation of or burden upon such commerce, as is also the statute which authorizes its imposition.

Point III. 28

Even if the tax in question can be deemed a property tax it is invalid, in that it violates the Commerce Clause of the Federal Constitution.

Conclusion 34

Appendix A 35

Table of Constitutional Provisions, Statutes, and Cases Cited.

Constitutional Provisions.

	PAGE
Constitution of the United States (Commerce Clause, Art. I, Sec. 8, Par. 3)	4
Constitution of New Jersey (Art. IV, Sec. VII, Par. 12)	12

Statutes.

Act of 1884 of New Jersey (P. L. 1884, p. 235)	9
Act of 1900 of New Jersey (P. L. 1900, p. 502, as amended)	2, 35
Act of 1928 of New Jersey (P. L. 1928, p. 223)	3
General Tax Act of New Jersey (P. L. 1918, p. 847, as amended)	7
Judicial Code, as Amended (U. S. C. A., Title 28, Sec. 344)	5
45 Stat. at Large Chap. 14	5
45 Stat. at Large, 446	5

Cases.

Alpha Portland Cement Co. v. Mass., 268 U. S. 203	21, 28
Barret v. New York, 232 U. S. 14	21
Bergen Aqueduct Co. v. State Board of Taxes and Assessment, 95 N. J. L. 486	8
Bowman v. Continental Oil Co., 256 U. S. 642	21
Crew Levick Co. v. Penna., 245 U. S. 292	13, 21
Crutcher v. Kentucky, 141 U. S. 47	20
Cudahy Packing Co. v. Minn., 246 U. S. 450	10, 27
Dist. of Columbia v. Riggs Nat. Bank, 30 Fed. (2d) 873; 279 U. S. 846	15
Eastern Penna. Power Co. v. State Board of Taxes and Assessment, 103 N. J. L. 281	8
Flint v. Stone Tracey Co., 220 U. S. 107	24
Galveston, etc., Co. v. Texas, 210 U. S. 217	13, 19, 24, 28
Hyman v. Hayes, 236 U. S. 178	20

PAGE

Le Loup v. Mobile, 127 U. S. 640 ..... 6, 20
Lyng v. Michigan, 135 U. S. 161 20
Maine v. Grand Trunk Ry. Co., 142 U. S. 217 ..... 4, 10, 24
Macallen, The, Co. v. Mass., 49 Sup. Ct. Rep. 432; 279 U. S. 620 13
McCall v. California, 136 U. S. 104 20
Meyer, etc., of Oklahoma v. Wells Fargo & Co., 223 U. S. 298 26
Norfolk & Western R. R. Co. v. Penna., 136 U. S. 114 20
North Jersey Street Railway v. Jersey City, 73 N. J. L. 481; aff'd 74 N. J. L. 761 ..... 8, 12, 18
N. W. Mut. Ins. Co. v. Wisconsin, 247 U. S. 132 29
Ozark Pipe Line v. Monier, 266 U. S. 555 ..... 21, 28
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1 6
Philadelphia & Southern Mail S. S. Co. v. Penna., 122 U. S. 326 18
Phillipsburg Horse Car R. R. Co. v. State Board of Assessors, 82 N. J. L. 49 ..... 9, 23
Postal Telegraph v. Adams, 155 U. S. 688 22
Potomac Elec. Power Co. v. Rudolph, 29 Fed. Rep. (2d) 634; Certiorari denied, 278 U. S. 656 15
Pullman Co. v. Richardson, 261 U. S. 330 22
Quaker City Cab Co. v. Penna., 277 U. S. 389 13
Security Savings and Com. Bank v. Dist. of Columbia, 279 Fed. Rep. 185 14
Sprout v. South Bend, 277 U. S. 163 23
Union Tank Line Co. v. Wright, 249 U. S. 275 33
United States Express Co. v. Minn., 223 U. S. 335 ..... 10, 27
Western Union Telegraph Co. v. Commercial Milling Co., 218 U. S. 406 6
Western Union Telegraph Co. v. Pendleton, 122 U. S. 347 6
Western Union Telegraph Co. v. Texas, 105 U. S. 460 6
Williams v. Talladega, 226 U. S. 404 20

Supreme Court of the United States

October Term, 1929.

No. 254.

NEW JERSEY BELL TELEPHONE COMPANY, *Appellant,* vs. THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY, *Appellee.*	On Appeal From the Court of Errors and Appeals of New Jersey.

BRIEF FOR APPELLANT.

Opinions of Courts Below and Grounds of Jurisdiction.

This case is here on appeal from the Court of Errors and Appeals of New Jersey, the highest court of that State. The opinion of the Supreme Court of New Jersey, the Court in which this case was first litigated, is reported in 143 Atl. Rep. 841 (not yet officially reported) and is quoted in full on pages 22-27 of the record.

The opinion of the Court of Errors and Appeals simply affirmed the judgment of the Supreme Court on the opinion of that Court. It is reported in 146 Atl. Rep. 915 (not yet officially reported), and is quoted at page 30 of the record.

In accordance with paragraph 1 of Rule 12 of this Court, appellant, in due course, filed with this Court a "Statement As To Jurisdiction On Appeal", and the Court has found that probable jurisdiction has been shown.

Statement of the Case.

The appellant, a New Jersey corporation, is engaged in the business of furnishing telephone service to and from points lying wholly in New Jersey and to and from points in that state and points in other states of the United States and in foreign countries.[1] In the conduct of its business, appellant uses and occupies—by poles and conduits—various public streets, highways, roads and other places in New Jersey. It owns a vast amount of real and personal property located in various taxing districts of New Jersey, in part on private property and in part on or in the public streets and highways.[2]

Pursuant to the provisions of an act of the Legislature of New Jersey approved March 23, 1900, as the same has been amended[3] (a copy of which is set forth in Appendix A and is hereinafter referred to as the Act of 1900), appellant filed with the State Board of Taxes and Assessment of New Jersey, hereinafter referred to as appellee, a report setting forth so much of its gross receipts for the year ended December 31, 1927, as it considered properly taxable under that act.[4] This return did not include any of appellant's receipts derived from the transmission of telephone messages to and from points in New Jersey and points outside of that State, as it was considered by appellant that these were not taxable because they arose from interstate commerce.[5] Subsequently, appellee directed appellant to supplement its

---

[1] R., p. 17.
[2] R., p. 17.
[3] 4 N. J. Compld. Stat. p. 5298; P. L. 1917, p. 421; P. L. 1918, p. 907; P. L. 1927, p. 567.
[4] R., p. 18; pp. 3-4.
[5] R., p. 18; pp. 8-9.

report by including the gross receipts derived from interstate commerce.[6] Appellant promptly complied with that requirement.[7] The latter report, however, was made under protest upon the ground that no tax could be lawfully levied upon the gross receipts derived from appellant's interstate business.[8]

On October 1, 1927, appellant succeeded to the property and business of the New York Telephone Company in New Jersey. The latter company did not file a report of its gross receipts for the year 1927 because it had ceased to operate in New Jersey on September 30, 1927 and therefore was not subject to the tax provided for in the Act of 1900.[9] Thereafter the New Jersey Legislature passed an act, which was approved March 27, 1928 (P. L., 1928, p. 223, and hereinafter referred to as the Act of 1928), requiring appellant to report the gross receipts of the New York Telephone Company during the part of the year 1927 when the latter was carrying on the business in New Jersey to which appellant succeeded, and to pay a tax for the year 1928 based thereon. As this latter statute is not involved in any of the questions presented in this case, it is not quoted. Accordingly, on April 9, 1928, appellant filed the report required by the last-mentioned statute, which included the gross receipts derived by the New York Company from transmitting and receiving telephone messages to and from the State of New Jersey and other states and foreign countries, as well as those messages transmitted and received wholly within the State of New Jersey.[10] Appellant again protested, however, that the gross receipts

[6] R., p. 19; p. 10.
[7] R., p. 19; pp. 5-6.
[8] R., p. 6.
[9] R., pp. 4-5.
[10] R., pp. 19-20; pp. 7-8.

derived from interstate business were not subject to taxation under either statute.[11]

On May 15, 1928, appellee assessed a tax against appellant based on its total gross receipts and those of the New York Company for the year 1927, which receipts included those derived from interstate as well as intrastate business.[12] The tax so assessed amounts to $1,058,997.85.[13]

It was appellant's contention before the Courts below that so much of the tax as is based upon its gross receipts and those of the New York Company derived from interstate business is invalid because it constitutes an unlawful regulation of, or burden upon, interstate commerce in violation of Article I, Section 8, Paragraph 3 of the Federal Constitution[14], and it so contends here. This contention, of course, also necessarily includes the contention that in so far as the Act of 1900 authorizes the imposition of the tax, it likewise is invalid for the same reason.

The New Jersey Supreme Court before which the case first came for decision sustained the tax.[15] From the opinion of the Court delivered by Mr. Justice BLACK[16] it would appear that while the Court expressly followed one of its prior decisions (which decision was rested upon what it assumed this Court had decided in *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217), it nevertheless concluded that quite independently of that case the tax was valid.

An appeal was taken to the New Jersey Court of Errors and Appeals and the judgment of the Supreme Court was affirmed "for the reasons expressed in the opinion deliv-

---

[11] R., p. 8.
[12] R., p. 20; p. 21.
[13] R., p. 20; p. 13.
[14] R., pp. 16-17.
[15] R., pp. 27-28.
[16] R., pp. 22-27.

ered by Mr. Justice BLACK in the Supreme Court".[17] Thereupon, the case was brought to this Court on appeal, pursuant to Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Section 344) and the Act of January 31, 1928 as amended by the Act of April 26, 1928 (45 Stat. at L., Chap. 14; 45 Stat. at L., 446).

Specification of Assigned Errors Relied Upon.

Appellant relies upon assigned errors numbered 1 and 2 as the same are set forth on pages 32 and 33 of the record.

No question is raised as to the right of the state to impose a tax on appellant based on the receipts of the New York Company derived from business done in 1927 *wholly* in New Jersey.

Summary of Argument.

1. The tax in question is not a substituted or commuted property tax imposed in lieu of other property taxes, but is a license tax, at a fixed rate of 5%, levied directly on appellant's gross receipts derived from interstate as well as intrastate business, and is in addition to the ordinary ad valorem taxes on appellant's real and personal property.

2. Such a tax is a direct tax on gross receipts derived from interstate commerce, and is, therefore, to that extent, an invalid regulation of or burden upon such commerce, as is also the statute which authorizes its imposition.

3. Even if the tax in question can be deemed a property tax it is invalid, in that it violates the commerce clause of the Federal Constitution.

---

[17] R., pp. 30-31.

Argument.

It has been definitely settled by this Court that the transmission and receipt of messages by wire between different states constitute interstate commerce. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *LeLoup* v. *Mobile*, 127 U. S. 640; *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406.

I.

The tax in question is not a substituted or commuted property tax imposed in lieu of other property taxes, but is a license tax, at a fixed rate of 5%, levied directly on appellant's gross receipts derived from interstate as well as intrastate business, and is *in addition to* the ordinary *ad valorem* taxes on appellant's real and personal property.

The Act of 1900 (Appendix A), which is the act in question in this case, provides that all the property, real and personal, and franchises of persons or corporations except railroad, canal, street railroad and municipal corporations having the right to use or occupy and occupying the streets, highways, roads or public places in this state, shall be taxed as follows:

(a) The local or municipal authorities of the several taxing districts are to value, assess and tax, at local rates *all* of the property, both that located upon streets, highways, and public places, and that not so located, within

their respective taxing districts, in accordance with the general tax act of New Jersey (P. L. 1918, p. 847, as amended).

This is the ordinary ad valorem tax assessed against the real and personal property of appellant, to which all property in New Jersey is subject.

(b) The taxpayer is required to file with the State Board of Taxes and Assessment a report showing the gross receipts of its business over its whole lines during the preceding calendar year, together with a statement of the length of its whole lines, and the length thereof along streets, highways and public places in the State of New Jersey, and the board is then to assess a tax of 5% upon such proportion of the total gross receipts as the length of the lines of the taxpayer in streets, highways and public places in New Jersey bears to the length of its whole lines (Sec. 4-5); and to distribute the tax among the various taxing districts in which the property of the taxpayer is located in proportion to the value of the property located in their respective public streets, highways or public places (Sec. 6).

It is the latter tax which is in question here.

It is apparent that this tax is not a substituted or commuted property tax in lieu of all other taxes against the properties of the appellant, because, as above shown, the statute expressly provides for the assessment and collection of the ordinary *ad valorem* taxes on appellant's real and personal property. Nor is it in any sense a substituted or commuted property tax on appellant's franchise as *property*, but is simply a license or privilege tax. That this is so is manifest, we submit, from the following considerations:

1. The tax in question is designated in the Act as "a franchise tax" and is expressly stated to be, by the provisions of Section 8, "in lieu of all other *franchise* taxes" against taxpayers coming within the provisions of the Act.

2. The character of the tax imposed by this Act has been defined by the Courts of New Jersey on several occasions. *North Jersey Street Railway* v. *Jersey City*, 73 N. J. L. 481; affirmed, 74 N. J. L. 761; *Bergen Aqueduct Co.* v. *State Board of Taxes and Assessment*, 95 N. J. L. 486; *Eastern Pennsylvania Power Co.* v. *State Board of Taxes and Assessment*, 103 N. J. L. 281.

In *North Jersey Street Railway Co.* v. *Jersey City*, *supra*, Mr. Justice SWAYZE, when the case was before the Supreme Court, said (73 N. J. L., p. 483):

> "We think the tax on gross receipts *is not a property tax*, but a *license tax* imposed by the state as a condition precedent to the exercise of special privileges in the streets."

When the case came to the Court of Errors and Appeals, Mr. Justice PITNEY said (74 N. J. L. 765):

> "We agree with the Supreme Court that this tax on gross receipts *is not a property tax but a license fee* imposed as a condition upon which the enjoyment of special privileges in the streets is made to depend."

In *Bergen Aqueduct* v. *State Board of Taxes*, *supra*, Mr. Justice MINTURN, speaking for the Court of Errors and Appeals, said at page 489:

> "The fundamental rule is settled beyond controversy that the state may require *as the condition of*

> *a grant to do business* to a corporation, payment of a specific sum *based on the gross receipts.*"

This is, of course, but another way of saying that the tax imposed by the Act of 1900 is a license tax.

In *Eastern Pennsylvania Power Co.* v. *State Board, supra,* Mr. Justice BLACK, speaking for the Supreme Court, said:

> "The tax imposed under this statute is *a license tax pure and simple.*"

The nature of the tax on the gross receipts of street railway companies imposed by a similar statute passed in 1906 (P. L. 1906, p. 644; before the passage of that act street railways had been taxed under the Act of 1900), was considered by the Supreme Court in *Phillipsburg Horse Car R. R. Co.* v. *State Board of Assessors,* 82 N. J. L. 49. The two statutes are so similar that the decision may be taken as an authority under the Act of 1900. Mr. Justice TRENCHARD, speaking for the Court, traced the history of the legislation and points out that the Act of 1884 (P. L. 1884, p. 235) was the predecessor of the Act of 1900 and the Act of 1906. He says (p. 54):

> "It appears, therefore, that the tax measured by gross receipts which was first imposed on the street railway companies under the Act of 1900, and continued by the Act of 1906, was imposed in lieu of the tax upon the franchise to exist as a corporation assessed under the Act of 1884."

And from this he concludes (p. 55):

> "We hold, therefore, that the tax in question is not levied on the gross receipts of the corporation

> nor on the business of the corporation, but is merely an *excise tax* on the franchise of the corporation, viz, the franchise to exist and the franchise to occupy the streets, which is measured in part by the gross receipts."

The Act of 1906, referred to by *Mr. Justice* TAWNEY, laid a two per cent gross receipts tax on telephone companies and in the opening paragraph designated the tax as

> "An annual tax, for the use of the State, by way of a *license* for its corporate franchise, as hereafter mentioned."

In the present case, *Mr. Justice* BLACK, after stating that the Supreme Court felt bound to follow the *Philadelphia* case, *supra*, and that it was rightfully decided, proceeded to find a justification for the tax under decisions of this Court other than *Maine v. Grand Trunk Railway Co.*, *supra* (142 U. S. 217), upon which the Court in the *Philadelphia* case relied. He said:[1]

> "The State distinguishes the cases above cited from the present case and urges, in the case at bar, the tax in question is the only one imposed by statute upon the property right, i. e., the franchise right of the prosecutor, to use the public streets, and that, in valuing that property right account may be taken under the doctrine in the case of the United States Express Co. v. State of Minnesota, 223 U. S. 335, of the total receipts of which the employment of such special franchise gives rise, including receipts from interstate commerce, or as expressed by *Mr. Justice* VAN DEVANTER, in the case of Cudahy Packing Co. v. State of Minnesota, 246 U. S. 450, it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as an

[1] P. 2.

> index or measure of the *value of the property* for taxing purposes. We think that is the situation in this case. The method adopted for calculating the tax, viz., the gross earnings being taken merely as a measure of the *value* of the franchise of the prosecutor." (Italics ours.)

From the above quoted language, it would at first seem that the Supreme Court, in the case at bar, considered the tax in question as one on property as distinguished from a license tax. When it is remembered that the judgment of the Supreme Court was affirmed by the Court of Errors and Appeals on the opinion of Mr. Justice Black, it would also appear that the Courts of New Jersey, *in order to sustain the tax in question*, have completely reversed the position which they first took in 1906 in *Building North Jersey Street Railway v. Jersey City*, *supra*, and continuously maintained and reiterated through 1907 when *Eastern Pennsylvania Power Co. v. State Board of Assessors*, *supra*, was decided.

On the other hand, the expressed concurrence in the decision in the *Phillipsburg* case (which as before stated was based on the theory that the tax was a *license tax*) would seem to indicate that the Court also considered the tax as a license tax. We are, therefore, confronted with a decision which, from our viewpoint, is not only in conflict with the uniform line of decisions extending over a period of more than twenty years, but which seems to be at variance with itself. For these reasons, and another which we will presently mention, we do not think that the New Jersey Courts intended, in the case at bar, to hold the tax as one on property but rather misconceived the purport of the decisions of this Court which are cited in the before-quoted part of Mr. Justice Black's opinion. This is more manifest when the following is considered:

The Constitution of New Jersey (Article IV, Section VII, Paragraph 12) provides that:

> "Property shall be assessed for taxes under general laws and by uniform rules according to its true value."

In *North Jersey Street Railway Co.* v. *Jersey City*, *supra*, in which decision the Court of Errors and Appeals concurred (74 N. J. L. 761, *supra*), Mr. Justice Swayze, speaking for the Supreme Court, said in considering whether the Act of 1900 was in conflict with this provision of the State Constitution (pp. 402, 403):

> "The objections to the constitutionality of the Act are two—first, that a tax upon gross receipts is not a tax according to true value as required by the Constitution, for the reason that the percentage of gross receipts must be levied though the exercise of the franchise may actually involve a loss and the franchise may be of no value; second, that the Act attempts to provide two different methods of taxation for the property of the corporation—one by local assessors according to its value, the other an arbitrary imposition by a State Board. The first objection is fatal to the validity of the Act if the franchise tax is to be imposed as a *property tax*; if it is not a property tax, the second objection is without force.
>
> *We think the tax on gross receipts is not a property tax, but a license tax imposed by the State as a condition precedent to the exercise of special privileges in the streets.*" (Italics ours.)

And again (p. 405):

> "We ought not, unless compelled, to adopt a construction which would make the Act a clear violation of the constitutional requirement that property be assessed at its true value. * * * That the legisla-

ture *did not* intend the tax on gross receipts to be a *property tax* is indicated by the distinction made between property and franchises throughout the Act." (Italics ours.)

It thus appears that the Supreme Court as the Court of Errors and Appeals have expressly held that if the tax in question were a property tax, it would be invalid under the Constitution of New Jersey. There is no intimation in the opinion in the case at bar, of an intention on the part of the Courts of New Jersey to depart from this conclusion. Indeed it is difficult to see how they could do so.

We respectfully submit, therefore, that under the decisions of the courts of New Jersey, the tax in question is a license tax, and if it were a property tax it would be invalid under the State Constitution.

2. It is well settled, however, that this Court will determine for itself the nature of a tax which is claimed conflicts with the Federal Constitution.

Galveston, etc. Ry. Co. v. Texas, 210 U. S. 217, 227;

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294;

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 403;

The Hamilton Co. v. Massachusetts (ruled May 27, 1929), 279 U. S. 630. Rehearing denied Oct. 14, 1929.

There are a number of considerations which we submit, must lead this Court independently to the conclusion that it is in truth and reality a license tax and was intended.

(a) The tax in question in this case has [illegible] tax on the business of the appellants a license

tax. The language of Section 4 of the Act of 1900 is: "and the franchise tax * * * for *business* so done in this state shall be * * *, etc." Again, the tax is dependent upon the *amount of business done*, and as was stated in the opinion in *North Jersey Street Railway* v. *Jersey City*, *supra*, the percentage of gross receipts must be levied as a tax, although the franchise may be of no value.

Appropriate to this reasoning is the language of Chief Justice Shepp of the Court of Appeals of the District of Columbia, in the case of *Security Savings and Com. Bank* v. *District of Columbia*, 279 Fed. Rep. 185. There the Court construed a gross earnings tax, based in part upon revenues derived from tax-exempt government bonds, levied against savings banks as a *franchise* tax. The Court said at page 186:

> "Appellant says the tax is a property one. If so, it is invalid. About this there is no contention."

But the District asserted that it was a franchise tax, and as such was valid. In this connection the Court said that the United States Supreme Court had considered the subject in a number of cases involving statutes not in precisely the same language as the one before it, which cases were cited. Then continuing it said (pp. 186, 187):

> "It will be observed that the paragraph we are considering imposes upon the corporation the *duty of paying* the tax, and provides that the amount shall be determined by the sum of the *gross earnings*. If there are no earnings, there will be no tax, no matter how much property the corporation may own, and there will be no earnings unless business is done. The amount of the tax fluctuates with the quantity of business transacted, and is measured by it. This indicates an intention to tax the *doing of business*, and *not the*

property; hence the tax is a franchise tax. Thus reasons the Supreme Court of the United States in the decisions just referred to." (Italics ours.)

The same construction was given to the Act before the Court in that case in *Potomac Elec. Power Co.* v. *Rudolph*, 29 Fed. Rep. (2d) 634 (decided Nov. 5, 1928), in which case a certiorari was denied, 278 U. S. 656. See also *Dist. of Columbia* v. *Riggs Nat. Bank*, 30 Fed. (2d) 873; certiorari denied 279 U. S. 846.

(b) That it was not the *intention* of the Legislature to measure the value of the franchise considered as property by the gross receipts, and thus to impose a property tax, is shown by the following consideration. The basis of the tax is a proportion of the total gross receipts in the ratio that the *line* mileage in the streets and highways bears to the company's total *line* mileage. By the method prescribed by an amendment to the Statute in 1927 (P. L. 1927, p. 367), as construed and applied, a mile of line is a mile of line *irrespective of the number of wires* in such line. One line may carry a single pair of wires and another may carry a number of cables with several thousand pairs of wires. The gross receipts per mile in the latter case would be many times those in the former case, and consequently if the basis for determining the value of the right to use the streets is line mileage, the gross receipts cannot have any relationship thereto. They may be and are a measure of the value of the business done, and this points inevitably to the conclusion that the tax was intended to be a *license tax and not a property tax.*

(c) While it happens to be true in this case that all the lines of appellant lie wholly within the state of New Jersey, the statute expressly contemplates and applies to the case

of a company whose lines extend into and throughout other states and provides for the allocation to the state of New Jersey of the entire gross receipts of the system in the ratio that the line mileage on the highways of New Jersey bears to the total line mileage of the system. (See Sc. 4 of the Act, Appendix A.) These provisions may be looked to in order to ascertain the legislative intent. The amount of business carried on over telephone lines is proportional of course to the number of wires and not to the length of line, and the number of wires may vary from two open wires on a pole to more than a thousand wires in a single cable and to several thousand wires when several cables are carried in a single conduit. If the average number of wires per mile of line in New Jersey is half that in Pennsylvania, for example, the allocation of the gross receipt of the New Jersey-Pennsylvania system to the state of New Jersey on the basis of line mileage results in imputing to New Jersey for tax purposes gross receipts earned in Pennsylvania. It is obvious therefore that the legislature could not have thought that it was dealing with property values for taxation in enacting this statute.

(d) In cases where the gross receipts are resorted to, to measure a property tax, *only* those receipts derived from the use of the property that ought to be taxed are properly to be considered. *Here however the receipts from the entire property real, personal and mixed including the receipts from the use of the franchises, are taken as a measure of the value of the "franchise".* The gross receipts are derived not only from the use of lines but also from buildings, machinery, equipment, cash and the vast array of assets put by the telephone company to productive use in its business. The earnings from all this vast property are by the method provided in the statute considered

as producing earnings attributable to the lines on the highway alone and to measure the value of the mere right to use these lines. Obviously this is in direct disregard of the cardinal test above referred to, that the earnings taken must bear a direct relation to the property to be taxed by the substituted property tax.

(e) A further important circumstance to be noted is the fact that under the Act of 1884 (referred to in the *Phillipsburg* case) the tax was at the rate of 2%; that rate was continued by the subsequent amendatory acts down to the Act of 1917, *supra* (which amended the original Act of 1900) when a sliding scale was provided, under which the tax was increased 1% each year until it reached 5%, the present rate. It thus appears that the rate now in effect is the result of a sliding upward scale imposed in advance, and when it could not possibly be known whether such a sliding scale would produce a tax commensurate with the ordinary tax on other property. The imposition of such a fluctuating rate negatives the idea of a bona fide effort to impose a property tax designed to equate the tax on this species of property with the ordinary tax on all other property, by uniform and equal rules throughout the state, as required by the state constitution.

(f) Another feature of the Act which tends to deprive it of the character of a true property tax is the allowance in Section 7 of a credit against the tax computed at the statutory rate of any payment by the taxpayer to the municipality, pursuant to any contract providing therefor. Such a credit provision destroys the character of the tax as a property tax and subjects it to criticism as ununiform and hence unconstitutional.

(g) In conclusion, we submit, that this court should be loath, indeed, to hold this to be a property tax in view of

the express holding of the New Jersey courts in *North Jersey Street Railway Company* v. *Jersey City, supra,* (73 N. J. L. pages 481-483; 74 N. J. L. pages 761-765), that if it were a property tax it would violate the before quoted provision of the New Jersey Constitution.

We therefore submit that by the (a) language of the Act itself and (b) the construction given to it by the courts of New Jersey for over 20 years, (c) together with its inherent characteristics, the tax under consideration is a license tax and not a property tax. As pointed out at the beginning of the discussion under this point the tax is in addition to and not in lieu of the ordinary *ad valorem* tax on appellant's real and personal property; and is imposed at a fixed rate on the gross receipts derived in part from interstate commerce.

II.

The tax in question being of the kind and having the characteristics set forth in the next preceding point is a direct tax on gross receipts derived from interstate commerce, and is, therefore, to that extent, an invalid regulation of or burden upon such commerce, as is also the statute which authorizes its imposition.

In the old and often cited case of *Philadelphia & Southern Mail Steamship Company* v. *Pennsylvania*, 122 U. S. 326, the State of Pennsylvania assessed a tax upon the *gross receipts of a steamship company, incorporated under its laws,* which were derived from the transportation of persons and property by sea between different states, and to and from foreign countries. It was held that this amounted to a regulation of interstate and foreign com-

merce in conflict with the Federal Constitution. The question was examined from all of its angles. Mr. Justice BRADLEY said (p. 336):

> "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

* * * * * * *

Page 345:

> "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principal so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence."

In *Galveston, etc., Railway Company* v. *Texas*, 210 U. S. 217, Mr. Justice HOLMES, referring to *Philadelphia & Southern Steamship Company* v. *Pennsylvania*, *supra*, said (p. 224):

> "We regard this decision as unshaken and as stating established law."

In *Lyng* v. *Michigan*, 135 U. S. 161, Chief Justice FULLER said (p. 166):

> "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, *or on the receipts derived from that transportation, or on the occupation or business of carrying it on*, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." (Italics ours.)

There are many cases holding that the exaction of a license fee by a state or municipality from one engaged in interstate commerce, although he or it may also be engaged in intrastate commerce, conflicts with the Commerce Clause of the United States Constitution, among which may be cited *LeLoup* v. *Mobile*, 127 U. S. 640 (where the tax was imposed on an agent for a telegraph company); *McCall* v. *California*, 136 U. S. 104 (where it was sought to exact a license fee from a railroad maintaining an agency having no lines within the state); *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114 (where a railroad company having no line within the state was required to pay a license tax because it had an office there); *Crutcher* v. *Kentucky*, 141 U. S. 47 (where a license fee was exacted from an agent of an express company engaged in both intrastate and interstate commerce); *Williams* v. *Talladega*, 226 U. S. 404 (where a municipality attempted to exact a license fee from a telegraph company engaged in both intrastate and interstate business); *Hyman* v. *Hayes*, 236 U. S. 170

(where a privilege tax was imposed on a person engaged in soliciting orders for liquor which was manufactured in the state that imposed the tax, and shipped to other states); *Barrett* v. *New York*, 232 U. S. 14 (where an attempt was made to compel express companies engaged in both intrastate and interstate business to take out a license); *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (where a license tax, both flat and based on gross receipts, was imposed upon wholesale and retail dealers in goods, wares and merchandise); *Bowman* v. *Continental Oil Co.*, 256 U. S. 642 (where the tax was the same as in the last cited case but assessed against vendors of gasoline); and *Ozark Pipe Line* v. *Monier*, 266 U. S. 555, (where a franchise tax was based on a percentage of the capital stock and surplus employed by a pipe line company in the state). In this latter case Mr. Justice SUTHERLAND, at page 562, stated the rule as stated in *Lyng* v. *Michigan*, ~~supra~~.

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, there was involved a Massachusetts statute which provided that every foreign corporation should pay an annual "*excise* equal to the sum of $5 per thousand upon the value of the corporate excess employed by it within the Commonwealth" and "2½ per cent. of that part of its net income which is derived from business carried on within the Commonwealth." The question in the case was thus stated by Mr. Justice MCREYNOLDS, who wrote the opinion (p. 216):

> "The right to lay taxes on tangible property or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts *only* interstate business within her borders an *excise* tax measured by a combination of two factors—the proportion of the total value of

capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?" (Italics ours.)

After an examination of the authorities, the question was answered in the negative. He quoted with approval the general rule laid down by Chief Justice FULLER in *Postal Telegraph* v. *Adams*, 155 U. S. 688, at 695, which is the same as that above quoted from *Lyng* v. *Michigan*.

The general rules have been summed up fairly recently by Mr. Justice VAN DEVANTER in *Pullman Co.* v. *Richardson*, 261 U. S. 330, as follows, at page 337:

> "The principles to be applied in cases of this class repeatedly have been considered by this court and are now settled.
>
> A state can neither tax the act of engaging in interstate commerce, *nor lay a tax on the gross receipts therefrom*. In either case the tax would be a restraint or burden on such commerce, and its imposition an invasion of the power of regulation confided to Congress by the commerce clause of the Constitution (*citing cases*).
>
> The rule is otherwise with *property* used in interstate commerce. A state within whose limits such property is permanently located or commonly used may tax it (*citing cases*).
>
> And, if the *property* be part of a system, and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the state; in other words, the tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the system (*citing cases*).
>
> In taxing property so situated and used a state may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from

> its use in both intrastate and interstate commerce, as an index or measure of its value, and if the means do not involve any discrimination against interstate commerce, and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce" (citing cases). (Italics ours.)

In the very recent case of *Sprout* v. *South Bend*, 277 U. S. 163, Mr. Justice Brandeis, referring to "an occupation tax"—one for the privilege of engaging in a certain occupation—assessed against those engaged in both intrastate and interstate commerce, said at page 171:

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; *that the amount exacted is not increased because of the interstate business done;* that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." (Italics ours.)

Of course, there is no difference in principle between a tax imposed by a state or a municipality for the privilege of engaging in a certain business and a tax, such as the one at bar, imposed for the privilege of using the public streets and highways. In either case, the tax is a *license* tax as distinguished from a *property* tax. The tax here fails to meet any one of the four tests laid down in the foregoing quotation, although to be valid it must meet all of them.

As before stated the first decision of the New Jersey Courts which sustained an act in all respects similar to that now in question (*Philipsburg Horse Car R. R. Co.*

v. *Assessors,* 82 N. J. L. 49) was rested upon what it was thought that this Court had decided in *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217. We shall not attempt to analyze the latter decision except to note that it was decided by a five to four vote. It is discussed and considered at length in the later case of *Galveston, etc., Co.* v. *Texas, supra* (210 U. S. 217). In *Flint* v. *Stone Tracey Co.,* 220 U. S. 107, at 165, it is said to have been *interpreted* in the latter decision.

It was said by Mr. Justice Holmes, who wrote the opinion in the *Galveston* case, that the tax which was sustained in *Maine* v. *The Grand Trunk Railway,* was a *property* tax—not a *license* tax. The tax involved, based upon gross earnings, was a tax *in lieu of* all other taxes on the railroad property, other than the buildings and the lands and fixtures located outside the right-of-way, and the Court said (p. 226):

> "The estimated gross receipts per mile may be said to have been made the measure of the value of the property per mile."

This it will be seen was an entirely different application of the gross earnings tax from that applied in the *Philadelphia Steamship* case and also from that applied in the *Galveston* case.

Adopting the construction of Mr. Justice Holmes, we submit that the tax in question in the case at bar cannot be sustained under *Maine* v. *Grand Trunk Railway,* because the tax in question is not a substituted property tax.

We would direct attention, at this point, to the fact that in the opinion of the New Jersey Supreme Court in the case at bar, it is stated that the present appellant *relies* upon, among other cases, *Maine* v. *Grand Trunk Ry. Co.* Our position regarding that case was the same in the New

Jersey Courts as it is here. We not only did *not rely* upon it but we sought to distinguish it and show that the reliance of the New Jersey Supreme Court upon it in a previous case (*Phillipsburg, etc.* v. *Assessors, supra*) was wrong.

Nor can the tax be distinguished from that which was held to be invalid in the *Galveston* case. There a statute of Texas imposed upon railroads:

> "an annual tax for the year 1905 and for each calendar year thereafter equal to one per centum of its gross receipts if such line of railroads lies wholly within the state."

The lines of the railroads concerned were wholly within the state but they connected with other lines, and a part of the gross receipts was derived from the carriage of passengers and from freight coming from or destined to points without the state. The railroads contended that such receipts could not be taxed under the rule announced in *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania.* Mr. Justice HOLMES said (p. 227):

> "The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature

and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form" (citing cases). "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal to' 1 per cent. of gross receipts, and a tax of 1 per cent. of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to'.

"Of course, *it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state.*" (Italics ours.)

Again in *Meyer, etc., of Oklahoma* v. *Wells Fargo & Co.*, 223 U. S. 298, this court condemned a tax assessed pursuant to a statute of Oklahoma on the gross receipts of an express company in so far as the receipts were derived from interstate commerce, and reiterated the principle laid down in the *Galveston* case, *supra*. The statute as set forth in the opinion provided as follows:

"'Every corporation hereinafter named shall pay the state a gross revenue tax * * * which shall be in addition to the taxes levied and collected upon

> an ad valorem basis upon the property and assets of such corporation equal to the per centum of the gross receipts hereinafter provided, if such public-service corporation operate wholly within the state, and if such public-service corporation operates partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business'; with a proviso for fixing a different proportion if it 'more fairly represents the proportion which the gross receipts of any such public-service corporation for any year within this state bear to its total gross receipts.' "

It is, we submit, quite impossible to distinguish the tax in the case at bar from that which was condemned in the *Wells Fargo* case. Both are license taxes directly on gross receipts partly derived from interstate commerce, and are in addition to the ordinary *ad valorem* taxes.

Since the New Jersey Supreme Court in the case at bar relies on *United States Express Company* v. *Minnesota,* 223 U. S. 335, and *Cudahy Packing Company* v. *Minnesota,* 246 U. S. 450, attention is directed to the fact that this court found the tax in each of those cases not to be a license tax, but a tax *in lieu of all taxes* against the *properties* of the corporation,—*a substituted property tax*—and not greater than ordinary taxes would be. As heretofore shown, the tax in question here, is a *license* tax, not a *property* tax, and not *in lieu of* all taxes against the properties of appellant. It will be borne in mind that the New Jersey statutes impose an *ad valorem* tax against all of the real and personal property of the appellant (see Section 2 of the Act of 1900—Appendix "A"). The distinction, we submit, is vital and renders those decisions inapplicable to the case at bar.

In the court below, the appellee seemed to make some point of the fact that the appellant is a domestic corporation; as it did also that the validity of interference with interstate commerce was in a measure dependent upon the *degree* of the interference.

The fact that the appellant is a domestic corporation is of no moment because it has been definitely settled that a state has no more power to regulate or burden the interstate commerce of a domestic corporation than that of a foreign corporation. *Ozark Pipe Line* v. *Monier* (266 U. S. 555-567); *Galveston, etc., Co.* v. *Texas, supra* (210 U. S. 217-228).

Likewise, the degree of interference is of no importance. *Alpha Cement Company* v. *Mass.*, 268 U. S. 203. *The controlling factor is the character of the tax.*

It is accordingly submitted, that as the tax in question is not a substituted or commuted property tax but a license tax, it is a direct tax upon the gross receipts of appellant derived from interstate commerce, and is therefore an unlawful regulation of or burden upon that commerce.

III.

Even if the tax in question can be deemed a property tax it is invalid, in that it violates the Commerce Clause of the Federal Constitution.

The general principles are clear. The state may lay a property tax upon property permanently located or commonly used within its limits and the fact that the property is used in interstate commerce does not exempt it from such taxation. Instead of taking the *form* of an ordinary property tax, that is, tax rate applied to assessed valuation, the tax may be measured by a percentage of the gross receipts

from the use of the property. If the receipts from its use in interstate commerce are included, the tax can be sustained only as a property tax and not as a gross earnings tax, and will be sustained only upon the theory and in the event that the earnings taken may fairly be regarded as an index or measure of the value of the property taxed, and that the tax imposed is in lieu of and not greater than the ordinary property tax. And if the tax measured by gross receipts is one in addition to the ordinary property tax it is manifestly void.

Some examples of this kind of a tax conforming to the foregoing principles are the following:

The California tax on the gross earnings of public service corporations (Polit. Code, § 3664a) construed in *Pullman Co.* v. *Richardson, supra.* The rate on telephone companies is 5½ per cent.

The Connecticut tax on the gross receipts of public service corporations (G. S. 1918, § 1380). The rate on telephone companies is 4 per cent.

The Maine tax, construed in *Maine* v. *Grand Trunk Ry., supra* (R. S. 1916, ch. 9, § 36). The rate on telephone companies is at a graduated rate of from 1¼ per cent. to 6 per cent.

The Minnesota tax construed in *U. S. Exp. Co.* v. *Minnesota,* and *Cudahy Packing Co.* v. *Minnesota, supra* (G. S. 1923, § 2233, *et seq.*). The rate on telephone companies is 4 per cent.

The Rhode Island tax (G. L. 1923, ch. 38). The rate on telephone companies is 2 per cent.

The Wisconsin tax, construed in *N. W. Mut. Ins. Co.* v. *Wisc.,* 247 U. S. 132, 138 (Wisc. Stat. 1927, ch. 76). The rate on telephone companies is graduated from 2½ per cent. to 5 per cent.

In all these cases the gross earnings tax is in lieu of all other taxes upon the property of the company and is no more than the ordinary *ad valorem* tax imposed upon the property of other taxpayers and as such has been sustained by this Court.

Examples of taxes of this kind, which have failed to conform to the principles stated and so have been condemned are the Texas tax, construed in *Galveston, etc., Ry.* v. *Texas, supra,* and the Oklahoma tax, construed in *Meyer* v. *Wells Fargo, supra.*

The tax in the case here in judgment falls in this latter class and must be similarly condemned.

In the first place there is nothing in the words of the statute even remotely suggesting that the legislature intended this as a property tax, either in lieu of the ordinary property tax or otherwise. The plain import of the words used, as well as the nature and effect of the tax evidence a contrary intent, all of which we have pointed out *supra.*

In the second place all the physical property, real and personal, owned or used by the appellant is subjected to the ordinary property taxes levied generally upon the property of others throughout the state. It is assessed the same as other property and taxed at the same rates. This fact precludes the idea that this tax was to be a substituted or commutation tax, such as admits the inclusion of the receipts from interstate commerce in the basis. It is a tax plainly and expressly superimposed upon the full ordinary property tax.

The state's theory seems to be that after all this property has been valued as and where found and has been taxed dollar for dollar as other property in the state is taxed, there remains a further property value residing in the franchise to have and maintain a part of the poles,

wires, cables, conduits, etc., in the streets and highways, and that this *fragment* of property value is measurable by the gross receipts derived from the whole of the property, consisting of the property in the streets and similar property off the streets, and all the company's lands, buildings, and expensive central office and other equipment therein and working cash, materials and supplies, and that the state may tax such gross receipts, including those from interstate commerce, at the arbitrary rate of 5% a year, without encountering the condemnation of the Commerce Clause of the Constitution.

Upon this theory any one of the states referred to above as now having gross receipts taxes conforming to the principle of the lieu-tax may, by the artful use of a few words amending the statute, lay the ordinary *ad valorem* property tax upon all the real and personal property of telephone companies and at the same time retain the present gross receipts tax, making it one solely for the right to have and maintain telephone lines in the streets and in lieu of any other tax upon that right, thus evading the constitutional limitations imposed upon the taxing power of the states by the Commerce Clause.

The effect of the application of this theory to the facts of this case may be shown by the following computations. If we apply to the total assessed value of the property in the highways the average rate of *ad valorem* taxation as compiled by the State Board of Taxes and Assessment for the year 1928, viz. $3.877 per $100.,[19] it will produce a tax upon such property of $1,586,928.

The gross receipts tax alone amounts to $1,058,997. It thus appears that if this tax be considered as a property tax

[19] Thirteenth Annual Report of the State Board of Taxes and Assessment 1928—p. 9.

upon the franchise it would require appellant to pay a tax upon the mere right to use the highways equal to two thirds of the tax upon the physical property located therein. Or stated another way it would work out a value of the right to use the streets of two thirds the value of the property itself in the streets. In addition, as pointed out by Mr. Justice SWAYZE in *New Jersey Street Railway Company* v. *Jersey City, supra,* gross receipts can never measure the true value of a franchise because "the exercise of the franchise may actually involve a loss and the franchise may be of no value" although the gross receipts may be large.

We earnestly urge that if the mere statement of the theory does not refute it, the result of its application in the case at bar, as illustrated above, makes such a conclusion inevitable. If such a tax can be sustained, and if the state's theory is sound, it is difficult to see how any real protection to interstate commerce against state taxation remains. This tax has already been increased from 2% to 5% of the gross receipts. Suppose the legislature should now increase it to 10%. What protection to interstate commerce can the courts give, under the state's theory? The courts cannot set aside the tax merely because they deem it excessive, unless they have a legal test to apply, and under the state's theory there is no such test. Under the law as we understand it and have stated it above, there is such a test. The tax may not be more than the reasonable and fair equivalent of the ordinary property tax, for which it is a substitute. The taxpayer can always compare the tax measured in this way with the ordinary property tax. This is an understandable, reasonable, and workable rule. The ultimate measure is the ordinary property tax, but the law permits the state to substitute the measure

of gross receipts, upon the condition that the latter measure is so applied as to reach a result that is a fair equivalent, since in that case it can be seen that no burden is cast upon interstate commerce.

It would probably be correct to say that a telephone system could not exist at all, as a practical matter, without the right to run the lines through the streets. This right being indispensable, a *sine qua non*, the property might be said to have no value without that right. But value of property for taxation cannot be determined upon any such basis as that. See *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282.

CONCLUSION.

In conclusion we deem it appropriate to suggest that if it be admitted that the fragment of the total property here in question be held subject to the application of the principle of the lieu-tax and hence that this fragment may be taxed by reference to the entire earnings from all the property of appellant, then other fragments of the total property may be similarly treated and we should have a series of taxes, each at a fixed rate applied to the entire gross earnings, including the earnings from interstate commerce. We submit that such a situation would totally destroy the principle of the lieu-tax, which this court has developed as a means of enabling the states to require interstate commerce to "pay its way", while at the same time maintaining the integrity of the Commerce Clause.

It is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey should be reversed.

Respectfully submitted,

CHARLES M. BRACELEN,
FRANKLAND BRIGGS,
THOMAS G. HAIGHT,
ALFRED E. HOLCOMB,
LEONARD A. SWENEY,
Counsel for Appellant.

Appendix A.

An act for the taxation of all the property and franchises of persons, co-partnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, and except corporations taxable under the act entitled "An act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in this State," approved May twenty-third, one thousand nine hundred and six. (P. L. 1900, p. 502, as amended by P. L. 1917, p. 42.)

Sec. 1. All the property, real and personal, and franchises of all persons, co-partnerships, associations or corporations, other than municipal or corporations taxable under the act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, and other than corporations taxable under the act entitled "An act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in this State," approved May twenty-third, one thousand nine hundred and six, or any of the supplements or amendments thereto, which have acquired or may hereafter acquire authority or permission from the State or from any taxing district thereof, and have or may hereafter have the right to use or occupy and occupying the streets, highways, roads, lanes or public places in this State, shall hereafter be valued, assessed and taxed as hereinafter provided. (P. L. 1900, p. 502, as amended by P. L. 1917, p. 42.)

Sec. 2. The respective assessors or officers, having like powers and duties to perform, in each taxing district in

this State, shall each year ascertain the value of such property located in, upon or under any public street, highway, road, lane or other public place in each taxing district, and the value of the property not so located; when so ascertained, all such property shall be assessed and taxed at local rates, as now provided by law, and all proceedings for appeal, review and collection now available shall remain applicable. (P. L. 1900, p. 502.)

Sec. 3. The officers, whose duty it is to make the assessment in each taxing district, shall annually make a return, certified in writing, on or before January tenth in each year, of the valuation of all property assessed under the provisions of this act which is located in, upon or under any street, highway, road, lane or other public place in such taxing district, together with the names of the owners and those operating the same, and file the same in the office of the county board of taxation. The county board shall certify to the State Board of Taxes and Assessment a copy of the same on or before February twenty-eighth in each year. (P. L. 1900, p. 502, as amended by P. L. 1918, p. 907.)

Sec. 4. All such persons, copartnerships, association or corporations subject to taxation under the provisions of this act shall, on or before February first in each year, return to the State Board of Taxes and Assessment a statement showing the gross receipts of their business over, on, in, through or from their lines or mains in the State of New Jersey for the year ending December thirty-first next preceding; any person, co-partnership, association or corporation having part of his, her or its lines or mains in this State and part thereof in another State or States, or having part of his, her or its lines or mains on private property and part thereof on public streets, highways, roads, lanes or other public places, shall make a report showing the gross receipts of his, her or its business over, in, on and from the whole line or mains, together with a statement of length of the whole line or mains and the length of the line or mains in this State along any street, highway, road, lane or other public place; and the franchise tax of such person, copartnership, association or corporation for business so done in this State, shall be upon such proportion

of such gross receipts as the length of the lines or mains in this State, along, in, on or over any street, highway, road, lane or other public place bears to the length of the whole line or mains, all such statements or reports shall be subscribed and sworn to by the person, copartners or the president, vice-president or chief officer of each association or corporation; any person, copartnership, association or corporation, neglecting or refusing to make such annual statement or report shall forfeit and pay to the State of New Jersey the sum of one hundred dollars for each offence, to be recovered in an action of debt, in the name of the State, and when recovered shall be paid into the State treasury; it shall be the duty of the State Board of Taxes and Assessment to certify any such default to the Attorney-General of the State, who thereupon shall prosecute an action at law for such penalty; any person who shall falsely make any oath required to be made under this act shall be deemed guilty of perjury, and, on conviction thereof, liable to all penalties prescribed by law therefor. (P. L. 1900, p. 502, as amended by P. L. 1927, p. 567.)

Sec. 5. An annual franchise tax upon the annual gross receipts as aforesaid, upon all persons, co-partnerships, associations or corporations taxable under this act, shall be assessed as follows: the tax levied and assessed during the year one thousand nine hundred and seventeen computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and sixteen, shall be two per centum; the tax levied and assessed during the year one thousand nine hundred and eighteen computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and seventeen, shall be three per centum; the tax levied and assessed during the year one thousand nine hundred and nineteen computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and eighteen, shall be four per centum; the tax levied and assessed during the year one thousand nine hundred and twenty computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and nineteen, shall be five per centum; the tax levied and assessed annually thereafter shall be five per centum upon the gross receipts of the year ending De-

cember thirty-first next preceding; *provided,* that those persons, co-partnerships, associations or corporations, whose gross receipts shall not exceed the sum of fifty thousand (50,000) dollars, shall be assessed at the rate of two per centum per annum upon such gross receipts. (P. L. 1902, p. 503, as amended by P. L. 1917, p. 42.)

Sec. 6. The State Board of Taxes and Assessment shall annually ascertain and apportion the franchise tax to the various taxing districts in proportion to the value of the property located in, upon or under any public street, highway, lane or other public place therein, as shown by the statements so filed with said board; but the State Board of Taxes and Assessment shall have the power to inquire into, equalize and revise the valuations returned to them in said statements by the county boards of taxation, and to fix the valuations for that purpose for any taxing district which shall fail to file its return within the time required by law, so as to secure an equitable and fair valuation and apportionment of said franchise tax upon a uniform basis of valuation between the various taxing districts entitled thereto; the amount of the franchise tax shall be certified in writing to the respective collectors of taxes or officers having like power and duties to perform on or before May first in each year; *provided,* that no change in the apportionment of the franchise tax shall be made after the apportionment by the said State Board of Taxes and Assessment as aforesaid, except by and with the consent in writing of the assessors of the taxing district, whose proportion of the franchise tax would be reduced by such change, and all such changes heretofore made by such board with such consent are hereby validated; the collectors of taxes shall within five days after being so notified of such franchise tax, deliver or cause to be delivered, to each person, co-partnership, association or corporation taxable under the provisions of this act, a statement in writing showing the amount of such franchise tax so ascertained, which shall become due at the time and place when and where other taxes are due and payable in such taxing district, and the tax shall be and remain a first lien on the property and

assets of such person, copartnership, association or corporation, on and after December first following its assessment, until paid with interest and penalty thereon, and shall be collected in the same manner that other taxes are collected, and subject to the same discounts and penalties, and the same proceedings now available for the collection of other taxes shall remain applicable to the collection of the franchise tax. (P. L. 1900, p. 502, as amended by P. L. 1927, p. 567.)

Sec. 7. All money now payable by any person, co-partnership, association or corporation to any taxing district for its exclusive use pursuant to any contract, agreement, resolution or ordinance (except money expended for paving or repairing any street, highway or other public place, or taxes upon property, real and personal), shall be paid, notwithstanding this act, and when paid shall be considered a payment on account of, or in full, as the case may be, for the franchise tax to be apportioned according to the provisions hereof; if the amount so payable is greater than the amount of the franchise tax to be so apportioned, such payment shall be in lieu thereof; and if less, the difference in amount shall be payable as herein provided. (P. L. 1900, p. 504.)

Sec. 8. The franchise taxes imposed by this act shall be in lieu of all other franchise taxes now assessed against the persons, co-partnerships, associations or corporations, subject to the provisions of this act and their property. (P. L. 1900, p. 504, as amended by P. L. 1902, p. 477.)

Sec. 9. None of the provisions of this act shall be construed as in anywise to alter, impair or repeal any of the provisions of an act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, nor shall any corporation taxable under said act and the supplements and amendments thereto be taxable under this act; if any provision of this act shall, for any reason, be held to be unconstitutional or invalid it shall not affect the other provisions of this act or any of them. (P. L. 1900, p. 505.)